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No. 88-6546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Dept. of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE ON BEHALF OF SIX AMERICAN INDIAN TRIBES

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BRIEF AMICI CURIAE ON BEHALF OF SIX AMERICAN INDIAN TRIBES

This brief is filed on behalf of six American Indian tribes and tribal agencies: Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Menominee Tribe of Wisconsin; Metlakatla Indian Community of Alaska; Miccosukee Tribe of Florida; Oglala Sioux Tribal Public Safety Commission of the Oglala Sioux Reservation, South Dakota, and Navajo Nation.

All of these tribes and tribal agencies operate law and order systems on their respective reservations, under con-

tracts with the Bureau of Indian Affairs pursuant to 25 U.S.C. §§ 450-450n. All of them have understood that they had criminal jurisdiction over all Indians on the respective reservations, whether members or not, and until recently have been consistently exercising that jurisdiction. As governments with serious law enforcement responsibilities to the reservation communities, these amici strongly urge affirmance of the judgment below.

INTERESTS OF AMICI CURIAE

Amicus THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, North Dakota ("Three Affiliated Tribes"), is a federally recognized tribe consisting of the Mandan, Hidatsa and Arikara Tribes of Indians. The Tribe inhabits the Fort Berthold Reservation, containing about 1,000,000 acres. The Tribe's sovereign capacity has been recognized by treaties and statutes of the United States. *See* 7 Stat. 259, 261, 264 (1825); 11 Stat. 749 (1851); 26 Stat. 1032 (1891); 2 C. Kappler, Indian Affairs—Laws and Treaties (1904) [hereinafter "2 Kappler"] 237-242, 594.

The Indian population of the Fort Berthold Reservation is approximately 3,000, which includes 188 Indians who are members of tribes other than the Three Affiliated Tribes. Most of these are married to members of the Three Affiliated Tribes and are generally considered to be part of the Indian community. In addition, 688 nonmember Indians own interests in allotted lands within the Fort Berthold Reservation, and an estimated 6,000 nonmember Indians visit the Reservation each year to attend powwows and other social events.

Pursuant to the Tribal Code, the Tribal Court of the Three Affiliated Tribes exercised criminal jurisdiction over all Indians within the Reservation, members and nonmembers alike, until shortly after the decision of the Eighth Circuit in *Greywater v. Joshua*, 846 F.2d 486

(8th Cir. 1988). In the five year period from January 1984 through December 1988, 332 nonmember Indians were prosecuted in the Tribal Court under the laws of the Three Affiliated Tribes.

Amicus MENOMINEE INDIAN TRIBE ("Menominee Tribe") is a federally recognized tribe inhabiting the Menominee Indian Reservation in Wisconsin. The Tribe's sovereign capacity has been recognized by several treaties, principally the Treaty of May 12, 1854, 10 Stat. 1064, 2 Kappler 626, which established the Menominee Reservation. Federal recognition of the Menominee Tribe was terminated in 1954, 68 Stat. 250, but restored in 1973, 87 Stat. 770, 25 U.S.C. §§ 903-903f.

The Reservation contains approximately 235,000 acres. The 1986 reservation population was 3,939, of whom some 3,372 are members of the Menominee Tribe, some 194 are members of other Indian tribes, and some 373 are non-Indians.

Pursuant to the Tribe's Law and Order Code and Tribal Ordinance No. 79-14, the Tribe asserts criminal jurisdiction over all Indians within the Reservation, and its tribal police department enforces the law accordingly. The Menominee Tribal Court exercises criminal jurisdiction over all Indians, and its exercise of jurisdiction has never been challenged by a nonmember Indian.

Amicus METLAKATLA INDIAN COMMUNITY ("Community") is a federally recognized Indian Tribe inhabiting the Annette Islands Reservation in Alaska. This Reservation, which is the only federal Indian reservation in Alaska, was established by Congress for the Metlakatla Indians "and such other Alaska Natives as may join them." Act of March 3, 1891, 26 Stat. 1101, 25 U.S.C. § 495.

The 1987 population of the Reservation was 1,481, of whom 1,303 were members of the Community, 47 were nonmember Indians or Alaska Natives, and 178 were non-Indians. Most of the nonmember Indians or Alaska

Natives are married to members of the Community. Pursuant to its Law and Order Code, the Community asserts criminal jurisdiction over all Indians and Alaska Natives within the Reservation, and this assertion of jurisdiction has never been challenged. Given the isolated island location of the Community, the exercise of criminal jurisdiction by the Community over all Indian and Alaska Native residents is considered essential to effective law enforcement.

Amicus MICCOSUKEE TRIBE OF INDIANS ("Miccosukee Tribe") is a federally recognized Indian tribe in Florida, which occupies lands reserved by the Secretary of the Interior within the Everglades National Park, and a federal reservation north of the Park. They came under U.S. protection in the Treaty of Sep. 18, 1823, 7 Stat. 224, 2 Kappler 203.

Within the land areas under the jurisdiction of the Miccosukee Tribe the total population is estimated to be 525, which includes 278 tribal members and 247 nonmember Indians. Of the nonmember Indians, the greater part are so-called "independent" Indians, who are eligible for enrollment in the Tribe but who have elected not to become enrolled, and the remainder are members of the culturally related Seminole Tribe of Florida. Thus, while approximately 53 percent of the population of the community is comprised of enrolled tribal members, there is a very high degree of cultural homogeneity within the community. In addition to resident Indians, members of the Seminole Tribe are frequent visitors to the areas under the Miccosukee Tribe's jurisdiction. Under its Law and Order Code, the Tribe asserts criminal jurisdiction over nonmember Indians, and the Tribe's Public Safety Department enforces the Tribe's laws accordingly.

Amicus OGLALA SIOUX TRIBAL PUBLIC SAFETY COMMISSION ("Commission") is a corporation of the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota. The Commission was chartered in 1977 for the purpose of

administering law enforcement, by the Tribe, which is the federally recognized tribal governing body of the Pine Ridge Reservation. The Oglala Sioux Tribe is one of the seven tribes of the Great Sioux Nation. The sovereignty of the Nation and of its constituent tribes has been recognized in treaties and statutes of the United States, *e.g.*, 7 Stat. 252 (1825), 2 Kappler 230; 11 Stat. 749 (1851), 2 Kappler 594; 15 Stat. 635 (1868), 2 Kappler 998; 25 Stat. 888 (1877).

The Pine Ridge Reservation is the second largest reservation in the United States (after the Navajo Reservation) and includes some 2 million acres. The Indian population of the Reservation is approximately 21,250, which includes 18,250 who are enrolled members of the Oglala Sioux Tribe. The other 3,000 Indians are members of other tribes, almost all of whom are married to Oglala tribal members. Of the Indians of other tribes, approximately 80 percent are members of other Sioux Tribes and are thus closely related in culture to the Oglala Sioux Tribe. Pursuant to the Oglala Sioux Tribal Penal Code, the Commission exercises criminal jurisdiction over all Indians within the Reservation, members and nonmembers alike.

Amicus NAVAJO NATION is the largest federally recognized Indian tribe, comprised of approximately 173,000 members. The Navajo Reservation, which contains approximately 25,000 square miles of trust lands within the states of Arizona, New Mexico and Utah, was established by the Treaty of June 1, 1868, 15 Stat. 667, 2 Kappler 1015. More than 9,000 nonmember Indians reside on the Navajo Nation. Of those, an estimated 1,200 nonmember Indians are married to Navajos. About 1,100 nonmember Indians are being educated in elementary and high schools within the Navajo Reservation. Currently, some 1,544 nonmember Indians are employed on the Navajo Reservation.

The Navajo Nation currently exercises criminal jurisdiction over nonmember Indians who violate Navajo laws. The Navajo Law and Order Code applies to persons defined as any natural Indian individual, 17 N.T.C. § 208 (17). Some 150 nonmember defendants from a variety of tribes have been prosecuted by the Navajo Nation within the past five years.

The Navajo Nation Bill of Rights establishes explicit rights of the people within the Navajo Nation and limitations upon the exercise of government power. The rights provided to all Indian defendants go beyond the requirements of the Indian Civil Rights Act, 25 U.S.C. § 1302. For example, persons accused of a punishable offense, but unable to afford counsel, are entitled to have counsel appointed for them. 1 N.T.C. § 7.

SUMMARY OF ARGUMENT

While this Court has indeed pronounced dicta on several occasions to the effect that tribes have been divested of their jurisdiction over nonmember Indians, in none of the cases was the issue actually involved or adversarially briefed. Therefore, this Court should hear the issue *de novo* on this occasion.

This Court has ruled that a tribe's aboriginal jurisdiction continues unless and until divested by the United States expressly or implicitly. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 208 (1978). The pattern of dealings between the United States and the Indian tribes in the early days clearly implies that Congress and the Executive Branch had no intention or interest in divesting the tribes of their preexisting jurisdiction over nonmember Indians. Modern living patterns on Indian reservations show a need for such jurisdiction, and an assumption that it has existed. The Executive Branch has ruled that tribes have not been divested of such jurisdiction.

ARGUMENT

INDIAN TRIBES POSSESS CRIMINAL JURISDICTION OVER NONMEMBER INDIANS AS AN ASPECT OF ORIGINAL TRIBAL SOVEREIGNTY THAT HAS NEVER BEEN DIVESTED

A. The Issue Has Never Been Adversarially Briefed to this Court.

In 1978 this Court issued an opinion containing some potentially critical dicta, to the effect that tribes do not have jurisdiction over nonmember Indians.[1] Subsequent opinions have reiterated the dicta.[2] Presumably, the dicta

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[1] *United States v. Wheeler*, 435 U.S. 313, 326 (1978) ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe"). The *Wheeler* case also said (p. 326) that the *Oliphant* case, *supra*, "held [that tribes] cannot try nonmembers in tribal courts." No local page cite in *Oliphant* was given, and we were unable to find where *Oliphant* specifically supports the quoted holding; the closest place may be p. 208.

[2] *Montana v. United States*, 450 U.S. 544, 565 (1981) (". . . the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); cf. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853 n.14 (1985) and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-142 (1982), where this Court used "nonmember" in quotes or text without seeming to attach any particular significance to it.

See also Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), which held that tribes could not share their state tax immunities with white customers. The Court indicated in dicta that nonmember Indians were the same as whites for this purpose. At 161. That involves considerably different policy than whether a tribe has *criminal* jurisdiction over a nonmember Indian who violates tribal law. Therefore, we respectfully suggest that this Court's dicta in that case is of only limited relevance here. We note that this Court *has* allowed tribes to share certain immunities with nonmembers. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (unanimously *held*, tribe could allow non-Indians to hunt on reservation free of state game regulation); *see also Donahue v. California Justice*

was speaking only of *criminal* jurisdiction, since it is well settled that tribes clearly do have *civil* jurisdiction over non-Indians[3] and therefore, *a fortiori*, have *civil* jurisdiction over nonmember Indians.

In none of these cases were nonmember Indians involved, nor was the nonmember Indian issue adversarially briefed,[4] which means this Court never had the benefit of adversarial exposition of the relevant treaties, statutes, and congressional and executive policy. We hope and assume that now that the issue has been adversarially briefed for the first time, the Court will make its decision based on this briefing, and not on the earlier dicta.

B. The Tribes' Jurisdiction Over Nonmember Indians Has Never Been Divested.

No treaty or statute *expressly* divests Indian tribes of their pre-Columbian jurisdiction over nonmember Indians.[5] However, this Court has said that tribes may

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Court, 15 Cal.App.3d 557, 93 Cal. Reptr. 310 (1971), *cert. denied*, 404 U.S. 990 (tribe could allow nonmember Indian resident to fish on reservation free of state regulation).

[3] F. Cohen, *Handbook of Federal Indian Law* (1982), pp. 253-4; *Merrion, supra* (tribes have jurisdiction to tax whites on the reservation); *Nat'l Farmers Union, supra*, 471 U.S. at 854, and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (tribe has jurisdiction over civil claims by Indians against whites); *Brendale v. Confederated Yakima Tribes*, 109 S. Ct. 2994 (1989) (tribe has zoning power over white-owned fee land in part of reservation). *But see Montana, supra* (tribe has no civil regulatory power to restrict whites hunting on their own fee land within the reservation).

[4] The State in the *Colville* case (a *civil* jurisdiction case) argued for several pages on the nonmember Indian question (State's brief in Docket 78-630, pp. 91-96), but the tribe did not mention the point. Both briefs were over 100 pages long. The issue was not briefed by either side in *Oliphant, Wheeler, Montana, National Farmers*, or *Merrion*.

[5] This Court has recognized that prior to the arrival of Europeans in North America, the Indian tribes were independent political

be divested of their powers *by implication* "as a necessary result of their dependent status."[6] In *Oliphant* (p. 6 above), this Court held that tribes' criminal jurisdiction over white persons had been divested by implication.[7]

The reason for implied divestiture is the assumption that Congress would never have intended—or tolerated—white people being punished by Indian tribes who lacked the Anglo-American traditions of Due Process, Equal Protection, and other rights in the Bill of Rights. As this Court stated in *Oliphant*:

> "[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id.* at 210.[8]

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communities possessing all attributes of sovereignty. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

[6] "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, note 1 above, at 323.

[7] "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210. Also: "Indian tribes are prohibited from exercising those powers . . . 'inconsistent with their status.'" *Id.* at 208. These statements by the Court indicate that the implicit divestiture occurred when a tribe submitted to the overriding sovereignty of the United States, *i.e.*, when its status became that of a dependent sovereign. However, this Court has also said that tribal powers are not implicitly divested merely by virtue of the tribe's dependent status. *Colville*, note 2 above, 447 U.S. at 153.

[8] It could be argued that the 1924 general grant of U.S. citizenship to all Indians (8 U.S.C. § 1401(b)) had the effect of guaranteeing to all Indians the protections of the Anglo-American legal

However, at the formation of the Union and the adoption of the Bill of Rights, Indians were not citizens, and any traditions of individual liberties that tribes may have had were necessarily derived from much different sources. There is no evidence that Congress wished to limit a tribe's authority to punish Indians of other tribes without the safeguards contained in the Bill of Rights. That Congress did not intend to disturb a tribe's existing jurisdiction over a crime committed by a member of a co-equal sovereign tribe, is shown by the pattern of treaties with the tribes, and two important statutes enacted by Congress (18 U.S.C. §§ 1152 and 1153), more fully explained as follows:

1. ***Early Treaties Between the United States and Indian Tribes Support the Implication that Congress Expected Tribes to Handle Punishment of Intertribal Indian Crimes.***

As noted by this Court in *Oliphant*, 435 U.S. at 197 n.8, a number of early treaties have "bad men" clauses. These are typically clauses that addressed two serious problems relating to peace on the frontier: one, that "bad men" among the Indians would leave the reservation, commit crimes against white people and take refuge back on the reservation; and two, that "bad men" among the whites would come on the reservation, commit crimes against the Indians, then return to the safety of the white community. The typical language was to the effect that the Indians agreed to deliver to the U.S. bad Indians who

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traditions embodied in the U.S. Constitution. However, no case of which we are aware supports this argument, and cases after 1924 have held that tribes are not, generally speaking, subject to limitations of the U.S. Constitution in punishing Indian lawbreakers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978); *see* Cohen, *supra*, 663-672 (1982). In 1968 Congress mooted the point by extending most limitations imposed by the Bill of Rights to Indian tribunals. Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302.

harmed whites, in order that the U.S. would punish them and thus head off any vigilante action by the whites. Also, the U.S. agreed that any bad white man who harmed Indians would be punished by the U.S., to head off Indian retaliatory raids on whites. These provisions may be readily reviewed by going through the treaties gathered at 2 Kappler.

We reviewed scores of treaties up to 1871 (the end of the Indian treaty-making period), looking for indications one way or the other that the United States thought that Indians injuring other Indians was considered a problem that might be solved by having the U.S. take responsibility for punishing them. These treaties are too numerous to quote or cite (they are chronologically arranged in 2 Kappler), but any reader will see from them that crime by Indians against Indians on an individual level (as opposed to tribe against tribe) was not mentioned as a problem. It was presumptively left up to the tribes to handle as they saw fit.[9]

Following the reasoning of *Oliphant* (that tribes have jurisdiction unless Congress took it away, or unless such jurisdiction would deprive whites of their Bill of Rights protections), it is clear that nothing in the early treaties as a policy matter implicitly divested tribes of jurisdiction to punish crimes on their reservation committed by Indians from other tribes. In fact, the clear implication is just the reverse.

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[9] We did find a few relatively modern treaties that arguably gave federal jurisdiction over Indians who committed crimes against Indians of other tribes. *See, e.g.*, Treaty with the Sioux and Arapaho, 15 Stat. 635 (1868), 2 Kappler 998; Cheyenne and Arapaho, 15 Stat. 593 (1867), 2 Kappler 984. But none of the early treaties did, and even the few later ones that did may have been speaking of Indian victims who had severed their tribal relations.

2. *The Indian Country Crimes Act (18 U.S.C. § 1152) Supports the Implication that Congress Expected Tribes to Handle Punishment of Inter-tribal Indian Crimes.*

Title 18 U.S.C. § 1152, the "Indian Country Crimes Act," [10] states:

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country [as defined in 18 U.S.C. § 1151].
>
> "This section shall not extend to offenses committed *by one Indian against the person or property of another* Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." [11] Emphasis added.

The original purpose of section 1152 was to establish a means of punishing whites who committed crimes against Indians within reservations. Such a means of punishment was necessary in order to attempt to main-

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[10] F. Cohen, *Handbook of Federal Indian Law* 287, n.50 (1982), uses the term "Indian Country Crimes Act" as more descriptive than the more commonly used "General Crimes Act."

[11] This section has its roots in the early treaties and in the Indian Trade and Intercourse Acts enacted between 1790 and 1834. *See* Cohen, at 287. From 1790 until 1817, only crimes by non-Indians against Indians were punishable in federal courts under the Indian Country Crimes Act. *Id.* at 291, n.81. In 1817, Congress extended federal jurisdiction to crimes by Indians against non-Indians. *Id.* This provision was reenacted in 1834. Act of June 30, 1834, 4 Stat. 729, 733. In 1854, the tribal punishment and treaty exceptions were added. Act of Mar. 27, 1854, 10 Stat. 269, 270. No substantive amendments to § 1152 have been made since then.

tain peace on the frontiers, as Congress was concerned with "providing effective protection for the Indians 'from the violences of the lawless part of our frontier inhabitants.'" [12] The 1817 amendment added a measure of symmetry by providing that Indians who committed crimes against whites could also be tried and punished in federal courts.

By enacting an exception for crimes "by one Indian against another," Congress expressly recognized that such crimes were left to the tribes to handle. The face of the statute and its history [13] make no distinction between intra- and inter-tribal Indian crimes—the exception on its face covers all. Both Congress and the Executive Branch were aware that within the territory of many Indian tribes, Indians of other tribal affiliations could be found, either as residents or as visitors.[14] Congress's concern obviously was with interracial crimes only.

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[12] *Oliphant, supra,* 435 U.S. at 201, quoting Seventh Annual Address of President George Washington.

[13] The House committee report on the 1834 enactment states: "It is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, *at any place* within their own limits." H.R. Rep. No. 474, 23d Cong., 1st Sess. 13 (1834) (emphasis in original), quoted in Cohen, *supra,* at 117. This House committee report also states that it would be inconsistent with some treaty provisions for Congress to extend its criminal jurisdiction "to offences committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens." *Id.*

[14] *E.g.* (emphasis added passim): Treaty with the Shawnees, Art. III, 7 Stat. 26 (1786), provides that "any citizen of the United States, who shall do an injury to any Indian of the Shawanoe nation, *or to any other Indian or Indians residing in their towns* and under their protection, shall be punished according to the laws of the United States." Similarly, Treaty with the Cherokee Tribe, Article VI, 7 Stat. 18 (1785); 2 Kappler, 8, 9-10, provides: "If any Indian or Indians, or *persons residing among them,* or who shall take refuge in their nation, shall com-

In *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), a white man was charged in federal court for the alleged murder of another white man within the Cherokee Nation in Indian country. Both the defendant and the victim were whites who resided within the Cherokee Nation, who had married Cherokee women, and had been adopted into the tribe. Defendant argued that this was an Indian against Indian crime, so that the U.S. had no jurisdiction under § 1152. This Court rejected the argument and held that:

> ". . . the exception [in § 1152] is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. *It does not speak of members of a tribe, but of the race generally—of the family of Indians;* and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." 45 U.S. at 573 (emphasis added).

This Court again construed § 1152 in *In re Mayfield*, 141 U.S. 107, 115-116 (1891), dealing with an 1866 Cherokee treaty:

> "The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be *consistent with the safety of the white population with which*

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mit a robbery, or murder, or other capital crime, on any citizen of the United States, or person under their protection, the nation, or *the tribe to which such offender or offenders may belong*, shall be bound to deliver him or them up to be punished according to the ordinances of the United States; . . . ." Article V of the Treaty with the Choctaws is virtually identical. 7 Stat. 21 (1786), 2 Kappler, 11, 12. Similar provisions are found in Articles VIII and IX of the Treaty with the Creeks, 7 Stat. 35 (1790), 2 Kappler, 25, 27, and Articles X and XI of the Treaty with the Cherokees, 7 Stat. 39 (1792), 2 Kappler, 29, 31. Similarly, the Treaty with the Six Nations, Article VI, acknowledges that the delivery of goods by the United States to the Six Nations was to be for the benefit of the Six Nations "*and the Indians of the other nations residing among and united with them.*" 7 Stat. 44 (1794), 2 Kappler, 34, 36.

> *they may have come in contact*, and to encourage them as far as possible in raising themselves to our standard of civilization. . . . The general object of these Statutes is to vest in the courts of the [Cherokee] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." (Emphasis added.)

If in enacting § 1152 it had occurred to Congress that tribes would not or should not have criminal jurisdiction over nonmember Indians, one would suppose that Congress would have said something about it. Congress's silence here seems to be evidence of its satisfaction in 1834 that all Indian-against-Indian crimes continued to be subject to tribal laws, not federal. There is no evidence that Congress has ever changed its hands-off position on this point.

The Executive Branch has shared this view since at least as early as 1883. In that year, the Secretary of the Interior asked the Attorney General for advice on an inter-tribal Indian crime. The Attorney General advised that the federal courts did *not* have jurisdiction over a Creek who murdered an Arapaho on the Pottawatomie Reservation.[15] The Attorney General indicated that the accused Indian could be surrendered on demand to

> "one or other of the tribes concerned, founded fairly upon a violation of some law of one or other of them having jurisdiction of the offense in question according to general principles, and by forms substantially conformable to natural justice . . . ." *Id.* at 570.

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[15] 17 Ops. Atty. Gen. 566 (1883), cited in Cohen, *supra*, at 146 n.220 (1942 ed., not 1982 ed.). Cf. also a 1937 opinion of the Interior Solicitor, indicating that tribal jurisdiction over nonmember Indians would lie if the tribe amended its constitution to so declare. 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 736.

The Attorney General also cited the *Rogers* case, *supra*, in which this Court referred to § 1152 as not speaking "of members of a tribe, but of the race generally . . . ." (See fuller quotation p. 14, above.)

3. *The Major Crimes Act (18 U.S.C. § 1153) Supports the Implication that Congress Expected Tribes to Handle Punishment of Inter-tribal Indian Crimes.*

The Major Crimes Act provides for federal jurisdiction over major crimes committed by "any Indian . . . against . . . another Indian or other person . . . ." Nothing is said about any requirement that both Indians must be members of the same tribe. This Act was passed in 1885 as a result of "congressional displeasure" with this Court's decision in *Ex Parte Crow Dog*, 109 U.S. 556 (1883) (which held that the federal courts did not have jurisdiction over a Sioux who murdered another Sioux on the Sioux Reservation). Cohen, *supra* (1982 ed.) at 300. As the Court of Appeals below said,

> "That statute [§ 1153] punishes 'Indians' who commit crimes in Indian country. That usually means that the crime is committed on some tribe's reservation 'and the fair inference is that the offending Indian shall belong to *that or some other tribe* . . . [the statute's] effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of a reservation.' *United States v. Kagama*, 118 U.S. 375, 383 (emphasis added). The statute has *never* been restricted in its application to Indians who are members of the 'host' tribe." 851 F.2d at 1143 (emphasis in original).

As the Court of Appeals below realized, the question is not whether § 1153 *grants* jurisdiction to tribes to punish nonmembers, but whether it *divests* such jurisdiction. Clearly the Major Crimes Act did divest a tribe's exclusive jurisdiction to punish major crimes, but it said nothing of depriving a tribe of its power to punish minor crimes committed by nonmembers. Furthermore, this

Court's *Kagama* language (quoted p. 16 above), that § 1153 applies without regard to whether the perpetrator and the victim are of the same tribe, suggests that that question also does not matter in the case of *minor* crimes, the kind of tribes are most concerned with as a practical matter.

C. The Modern Situation on Reservations Argues That Tribes Should Continue to Exercise Criminal Jurisdiction Over Nonmember Indians.

The foregoing Section B indicates an early shared assumption on the part of all three Branches that Indian tribes *did* have criminal jurisdiction over nonmember Indians on the reservation, and that they would continue to do so. The modern policy considerations are to the same effect.

The populations of Indian reservations are less homogeneous today than they were in the early years of the United States. Not only do most tribal communities have members of other tribes mingling with the resident tribe's members, but in many cases the United States for its own purposes has set up reservations occupied *and governed* by two or more tribes jointly.[16] For reservations with tribal courts (which today means most reservations), we understand the overwhelming majority routinely exercise jurisdiction over nonmember Indians. That is certainly true for the six amici tribes. It would strike those tribes as strange indeed to suggest that enforcing law and order jurisdiction over all Indians in the tribal

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[16] For example, amicus Three Affiliated Tribes of the Fort Berthold Reservation (Mandan, Arikara and Hidatsa) has a single government and court system for all three tribes. In H. Rept. 2503, 82d Cong., 2d Sess. (1953), one of the recognized compendia of Indian data, the list of reservations, pp. 687-716, includes some 69 reservations where members of two or more named tribes reside, most of them, we understand, having joint governments. If subtribes of large Indian Nations (such as Sioux and Chippewa) are included, the figure is higher still.

community, members and nonmembers alike, is not essential to the peace of the reservation, one of the most important functions of any government. If the resident tribe is not going to cover domestic violence, disorderly conduct, driving while intoxicated, etc., who will? [17]

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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[17] If the perpetrator and victim are Indians, the federal apparatus is unavailable for minor Indian-against-Indian crimes on reservations. The only federal law that could grant jurisdiction is the Assimilative Crimes Act, 18 U.S.C. § 13, which only applies to Indians via 18 U.S.C. § 1152, which, as noted above, has a disclaimer for Indian-against-Indian crimes.

Even if states wanted to assume jurisdiction, they could not unless Congress has authorized them to assume jurisdiction over Indians on reservations under Public Law 280 (18 U.S.C. § 1162, 25 U.S.C. § 1321) or otherwise, which includes 9 states with full, and 8 states with partial, criminal jurisdiction. Even in those states that have full or partial criminal jurisdiction over Indians (which incidentally does not include Arizona), the record of law enforcement for minor crimes on reservations is generally considered unsatisfactory. *E.g.*, American Indian Policy Review Comm'n Report on Federal, State and Tribal Jurisdiction, 37-39 (1976).